No. 97-1695 and 97-1704

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,

Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS' COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE, INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS McGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS FLANAGAN AND MIDDLETON

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REPLY BRIEF OF PETITIONERS FLANAGAN AND MIDDLETON

NOW COME James Flanagan and David H. Middleton, Petitioners in Docket No. 97-1695, and present their Reply to the Briefs filed by various Respondents in opposition to their petition, as well as the petition filed by Esteban Ortiz, et al., in Docket No. 97-1704.

PREFACE

The Proponents of the Global Settlement urge most strenuously that *Ahearn* is one-of-a-kind, and that this Court ought to handle the matter in a pragmatic way and, by denying the instant petition for certiorari, allow the settlement to stand, even if it is violative of the principles laid down in *Amchem*. Effectively, the Proponents suggest that in the guise of expediency this Court ought to suspend the operation of its own precedent. The suggestion is tantamount to urging the Court to engage in an unscrupulous undertaking. This Court never suspends operation of one of its own precedents. With that, the underscoring point is made; the underpinning reasoning of the *Ahearn* Proponents is not only flawed, but is utter folly.

IT IS NOT THE PLACE OF A LOWER FEDERAL COURT TO "BEND" THE PRINCIPLES ENUNCIATED BY THIS HIGHEST COURT.

In his dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904), Justice Holmes wrote:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

To the extent the principles of class action law were not clear prior to *Amchem Products, Inc. v. Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), those principles are now "well settled". It appears that the Fifth Circuit panel majority which approved the *Ahearn* Global Settlement in *In re Asbestos Litigation [Ahearn I]*, 90 F.3d 963 (5th Cir. 1996) and *In re Asbestos Litigation [Ahearn II]*, 134 F.3d 668 (5th Cir. 1998) was suffering from those very "appeals to the feelings" – a sense that the Global Settlement is a deal which ought to be pushed through at all costs. This Court warned in *Amchem* that "the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind – class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

Indeed, Petitioners can only conclude that some consideration – whatever it may have been – competing with the lower court's duty of fidelity to the holdings of this Court "distort[ed] the judgment" of the Fifth Circuit panel majority.

The striking similarities between *Amchem* and *Ahearn* were, no doubt, central to this Court's issuance of a "GVR" order mandating further consideration on remand. Still, the Proponents of the Global Settlement distinguished their position by posturing a distinction without a difference. Witness the first sentence of their brief where the class representatives reason lamely:

> This is the *Ahearn* case not the *Amchem* case . . .

Continental likewise urges that the *Ahearn* Global Settlement is not a "carbon copy" of the *Amchem* Settlement. See also Continental's Brief, p. 5 (claiming that Petitioners "pretend that this case is *Amchem* itself").

The "carbon copy" argument is absurd. History teaches that no two events are exactly the same. Jurisprudence similarly recognizes that no two cases are precisely the same. The question an orderly system of jurisprudence asks is:

> *Is there sufficient similarity – in material aspects – between the case at bar and the prior case enunciating a general principle, that the principle of the prior case must be followed?*

As the highest tribunal in the land, this Court sits to announce *principles* of general application, not to make ad hoc proclamations with exclusive applicability to the precise facts before it.[1] (Were the latter so, the Court might just as well close its doors.)

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[1] As Petitioners pointed out in their Petition, common-law courts do not issue their decisions with the caveat that "This rule holds only to redheaded Walpoles in pale magenta Buick cars." *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring opinion,

IF LEFT UNCORRECTED, THE FIFTH CIRCUIT'S DECISION SETS THE STAGE FOR MORE *AHEARN* CLONES.

Two of these things go together,
Two of these things are kind of the same.

– Preschooler's song from *Sesame Street*

"Unique facts, unique facts": This is the siren song the Proponents of the *Ahearn* Global Settlement sing to this Court[2], urging that those facts will never be repeated, and hence, the Fifth Circuit's *Ahearn I* and *II* decisions are fated to gather dust as forgotten pages of the Federal Reporter.

In the first sentence of their Brief, the Insurers Continental, et al. , urge that *Ahearn* is "a *sui generis* case". "*Sui generis*" is defined variously as "Of its own kind; peculiar, unique." (The New Shorter Oxford English Dictionary 3135 [1993]); "Of its own kind or class; i.e., the *only one* of its own kind; peculiar." (Black's Law Dictionary 1286 [5th ed. 1979], emphasis in the original).

Laying to one side the question of whether a case which commenced not with the filing of a complaint[3], but with a barbeque at a judge's home is "peculiar", we consider whether *Ahearn* is a jurisprudential Paris Original, never-to-be-repeated, "the *only one* of its kind". The

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quotation attributed to Karl N. Llewellyn, *The Bramble Bush* [1960]).

[2] Counsel for the *Ahearn* Class are singing for a handsome supper, indeed: An award of attorney's fees in excess of $46 million is riding on this Court's decision whether to strike down or uphold the *Ahearn* Global Settlement.

[3] See Fed. R. Civ. P. 3.

Proponents of *Ahearn* have forgotten that, by virtue of being subject to American law, they are citizens of a jurisprudential universe governed by precedent. Now that *Amchem's* cogent teachings have become part of the *corpus juris*, lawyers and judges bound thereby will analogize to, or distinguish from, the facts of *Amchem*. This is not an inquiry we embarked upon for the first time in law school; indeed, at our mother's knee we start learning that "Two of these things are kind of the same".

Petitioners submit that, outside the ivory-tower world of legal sophistry, any honest, sensible, reflecting individual could not but conclude that not only are *Amchem* and *Ahearn* "kind of" the same; they are very much the same. This Court did not send the cause back for further consideration so that the lower tribunal could congratulate itself on the perfection of its initial reasoning. The Court issues a GVR order "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration. . . . " *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The Proponents of *Ahearn* are fooling no one. Defendants in mass-tort cases are even now crossing their fingers in the hope that this Court will deny certiorari and thus carve out the Fifth Circuit as a safe harbor in which they can force "unitary" settlements upon injured persons. As the Dissent wrote in *Ahearn I*:

> This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America

has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." [citation omitted]

Thus, th majority's reliance upon the "unique facts" of this case, *see* maj. op. at 993, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique facts – a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement – likely will become far too common now that the majority has approved of them.

Ahearn I Dissent, 90 F.3d at 994 (Smith, J.).

THE *LIGGETT* DECISION BELIES THE ASSERTION THAT *AHEARN*'S "UNIQUE FACTS" WILL NEVER BE REPEATED.

Incredibly, Continental asserts a "lack of any conflict among the lower courts as to [*Amchem's*] meaning" (Continental's Brief, p. 2). If left uncorrected by this Court, other toxic-tort defendants are as certain to follow the aberrational precedent of the *Ahearn I* and *II* decisions as "a flock of sea gulls follows a lobster boat." *United States v. Barnes*, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting).

This is abundantly shown by the decision *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D.W.Va. 1997). The court in that case, "one of the first of many that will interpret *Amchem*," had no difficulty in holding, in essence, that *Amchem* means what it says.

The proposed settlement in *Liggett* was drawn in the same "total peace" pattern as *Ahearn*.[4] In *Walker*, class plaintiffs and the defendant (a cigarette manufacturer) sought to certify a non-opt-out class under Rule 23(b)(1)(B) for settlement only. The settling parties claimed that "Liggett is in dire financial condition and facing a crush of pending litigation." 175 F.R.D. at 228. Liggett "entered into a comprehensive settlement agreement with Plaintiff and the putative class." *Id.* Like *Amchem* and *Ahearn*, the class was "nothing short of enormous." 175 F.R.D. at 229. Liggett sought an injunction to prevent further smoking-related litigation against it. *Id.* Prior to the issuance of this Court's *Amchem v. Windsor* decision, the District Court granted preliminary certification and preliminary approval of the settlement.

Upon issuance of this Court's *Amchem* decision, the District Court did a prompt about-face, setting aside the class certification. The court observed that *Amchem* "rests on two independent pillars: the predominance requirement of Rule 23(b)(3) and the adequacy-of-representation

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[4] *Walker v. Liggett Group* illustrates a central problem with the Fifth Circuit's *Ahearn I* and *II* decisions, which upheld the Global Settlement based on the alleged "unique facts" of the case. In a judicial system governed by precedent, the supposed "unique facts" become a blueprint for the creative lawyer. The "unique facts" are largely in the eye of the beholder.

standard of Rule 23(a)(4)." *Liggett*, 175 F.R.D. at 230, n.6 (citing John C. Coffee Jr., *After the High Court Decision in Amchem Products Inc. v. Windsor, Can a Class Action Ever Be Certified Only for the Purpose of Settlement?*, National L.J., July 21, 1997). The requirement of adequate representation is "an absolute prerequisite". *Id. Accord, Liggett*, 175 F.R.D. at 231 (adequate representation a "bedrock" consideration in considering propriety of class certification); 175 F.R.D. at 233 ("Rule 23(a)(4) must be satisfied for any proposed limited fund class, regardless of perceived notions of equity.")

In *Liggett* it was argued that because of the limited availability of funds to pay claims, the currently injured were in the same position as future victims. The Court rejected that argument:

> In reality . . . the alleged limited fund exacerbates the apparent conflicts creating what has been described as a zero-sum game.

Liggett, 175 F.R.D. at 231, n.8.

Despite its earlier approval of the non-opt-out, limited-fund settlement, the Court was unable to see any honest, good-faith way to distinguish *Amchem* from the case before it, and accordingly granted the Intervenor-Objector's motion to set aside the class certification: "While the parties differ in their reading of the Supreme Court's intentions, the bedrock similarity between *Amchem* and the instant case is manifest . . . " *Liggett*, 175 F.R.D. at 233.

The parties in *Liggett* filed suit without benefit of this Court's June, 1997 *Amchem* decision. Should this Court deny certiorari in this case, future *"Ahearns"* or *"Liggetts"*

will be filed in the hospitable Fifth Circuit – the only jurisdiction in which *Amchem* does not mean what it says.

CONCLUSION

These Petitioners submit that "the bedrock similarity between *Amchem* and the instant case is manifest . . . " *Liggett*, 175 F.R.D. at 233. The principles laid down in *Amchem Products, Inc. v. Windsor* require that the Fifth Circuit's approval of the *Ahearn* Global Settlement be set aside.[5]

DATED at Detroit, Michigan this 26th day of May, 1998.

Respectfully submitted,

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[5] The deeper we delve into the issues of this cause, the more it is recognized that the position enunciated in the dissenting opinions by Judge Jerry Smith in *Ahearn I* and *II* is not only cogent, but indeed compelling.